IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1405

WINTHROP DRAKE THIES,

Appellant,

against

JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Appellee.

MOTION TO DISMISS APPEAL.

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MOTION TO DISMISS APPEAL

Preliminary Statement

Appellee moves to dismiss an appeal of a final judgment of the New York Court of Appeals, entered October 19, 1978, amended by order of October 26, 1978, which

affirmed an order entered March 13, 1978, amended March 23, 1978, of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, which struck appellant's name from the roll of attorneys of the State of New York pursuant to New York Judiciary Law, Section 90, subdivision 4 (*Matter of Thies*, 61 A.D.2d 1037, affirmed 45 N.Y.2d 865, amended remittitur, 45 N.Y. 2d 924).

The New York Court of Appeals in its amended remittitur, *ibid* at 924, stated:

> Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: Appellant contended that mandatory disbarment pursuant to section 90 of the New York State Judiciary Law, based on conviction of a felony in another jurisdiction for acts which would not constitute a felony in New York State, was a deprivation of equal protection of the laws and of due process of law in violation of the Fourteenth Amendment and was cruelty in violation of the Eighth Amendment. The Court of Appeals considered these contentions and held that appellant was not deprived of his constitutional rights.

Appellant made applications to the United States Supreme Court for a stay of the order of disbarment pending submission of this appeal of the judgment which were denied by Justices Thurgood Marshall and Lewis F. Powell on November 15, 1978 and November 27, 1978, respectively. On February 8, 1979, the New York Court of Appeals denied appellant's motion for leave to reargue its prior decision of October 19, 1978, as untimely.

Jurisdiction

Appellant invokes the jurisdiction of this Court under Title 28, U.S.C. 1257(2). Justice Thurgood Marshall of this Court, by order dated January 11, 1979, extended appellant's time to docket this appeal until March 16, 1979.

Statement of the Case

Winthrop Drake Thies was admitted to the practice of law in New York State on December 16, 1959 by the Appellate Division of the Supreme Court, Second Judicial Department. On November 22, 1976, after a trial by jury, appellant was convicted in the United States District Court for the District of New Jersey of assault of a federal officer in violation of Title 18 U.S.C. Section 111, and sentenced as follows:

> The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: the defendant do [sic] pay a fine of $500.00, fine payable forthwith on Count 1.

Appellant was again convicted after a trial by jury in the United States District Court for the District of New Jersey, of conspiracy to sell stolen securities and sale of stolen securities in violation of Title 18, U.S.C. Sections 371, 2315 and 2 and sentenced as follows:

> The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and

ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three (3) years on Count 1; three (3) years on Count 2, said sentence to run concurrently with the sentence imposed on Count 1.

In December 1977, the United States Circuit Court of Appeals for the Third Circuit affirmed petitioner's felony conviction of assaulting a federal officer, and the United States Supreme Court denied a petition for a writ of certiorari with respect to that conviction. On January 23, 1978, the United States Circuit Court of Appeals did unanimously vacate the judgment of the District Court of February 28, 1977, as stated in petitioner's brief, but the opinion of the Circuit Court noted at the outset that the sole issue in the appeal was not whether the defendants' conduct was a criminal offense, "but whether it was a federal crime" (*U.S.A.* v. *Thies,* 569 F.2d 1268).

POINT ONE

Neither the Automatic Disbarment Statute (Judiciary Law, Section 90, Subdivision 4), nor New York's interpretation thereof (*Matter of Chu)* 42 N.Y.2d 490, infringes upon any constitutionally protected right.

Based upon his conviction of a federal felony crime, petitioner's name was struck from the roll of attorneys and counsellors-at-law of the State of New York, by order of the Appellate Division, Second Judicial Department on March 13, 1978, as amended March 23, 1978, pursuant to New York Judiciary Law Section 90, subdivision 4, which provides:

> "4. Any person being an attorney and counsellor-at-law, who shall be convicted of a felony, shall, upon such conviction, cease to be an attorney and counsellor-at-law, or to be competent to practice law as such.
>
> Whenever any attorney and counsellor-at-law shall be convicted of a felony, there may be presented to the appellate division of the supreme court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted shall, by order of the court, be struck from the roll of attorneys."

Prior to March 5, 1940, an attorney was deemed disbarred and his name was stricken from the roll of attorneys upon conviction of any crime statutorily defined as a felony under the laws of New York, a sister State or of the United States pursuant to the then Judiciary Law, Section 88, subdivision 3 (renumbered Judiciary Law, Section 90, subdivision 4 [1945]).

On March 5, 1940, the New York Court of Appeals in *Matter of Donegan* (282 N.Y. 285) qualified the automatic disbarment statute to the following extent:

> "Strict construction of section 88, subdivision 3 and section 477 of the Judiciary Law requires that the term 'felony' include only those Federal felonies which are also felonies under the laws of this State, and exclude such Federal felonies as are 'cognizable by our laws as a misdemeanor or not at all' " (supra at 292).

On October 13, 1977, the New York Court of Appeals modified the *Donegan* ruling in *Matter of Chu,* stating, in part, that:

> "We conclude that conviction of an attorney for criminal conduct judged by the Congress to be of

> such seriousness and so offensive to the community as to merit punishment as a felony is sufficient ground to invoke automatic disbarment. Whatever may have been the proper evaluation of a felony conviction in courts other than those of our own State in 1940 when *Donegan* was decided, we now perceive little or no reason for distinguishing between conviction of a federal felony and conviction of a New York State felony as a predicate for professional discipline (supra at 493)."

The New York Court of Appeals on October 19, 1978, in *Matter of Thies,* 45 N.Y.2d 866, declined to reconsider its earlier *Chu* decision that conviction of a federal felony works an automatic disbarment, reiterating that it was "immaterial that there is no felony analogue under our State statutes matching the federal felony" and pointed out that "the validity of the concept of automatic disbarment as applied to New York felonies has long been upheld."

Petitioner's contention that the application of the *Chu* ruling to him constitutes an *ex post facto* law is wholly without merit.

An *ex post facto* law has been defined as one:

> "which imposes a punishment for an act which was not punishable when it was committed, or imposes additional punishment, or changes the rules of evidence, by which less or different testimony is sufficient to convict." (C.J.S. Constitutional Law §435 et seq.)

Further, the constitutional limitation as to *ex post facto* laws has long been held by this Court to apply solely to criminal statutes (*Baltimore & S.R. Co.* v. *Nesbit,* 51 U.S. 395, see also, *Mahler* v. *Eby,* 264 U.S. 32). The case at bar is not a criminal proceeding.

Disciplinary proceedings have consistently been held to be civil in nature (*Matter of Zuckerman,* 20 NY2d 430, 438 [1967]), cert. den. 390 U.S. 925 [1968], and are not considered to be criminal (*Matter of Unger,* 27 AD2d 925 [1st Dept. mem. 1967], cert. den. 389 U.S. 1007 [1967]).

Petitioner's automatic disbarment is not violative of his constitutional guarantee of due process since that right was safeguarded throughout his jury trial in the federal court and upon the review of his conviction by the Circuit Court of Appeals for the Second Circuit. Petitioner's conviction of a federal felony crime has already been affirmed after appellate review and the United States Supreme Court itself declined to consider upon his previous petition for certiorari.

The State of New York has a compelling interest in regulating the practice of professions within its boundaries and is given wide latitude in determining what standards are appropriate for such regulation (*Goldfarb* v. *Virginia St. Bar,* 421 U.S. 773, 792 [1975]).

The interest of any state in the regulation of the practice of law is particularly important. The quality of the practice of law has a vital effect upon the public welfare. The requirement of high standards for attorneys is necessary not only to assure the orderly and efficient administration of justice but also to assure the public of proper counseling and representation. There are few areas of activity which do not have serious legal implications and the authority and responsibility conferred upon attorneys is extraordinary (*Ibid.; Schware* v. *Bd. of Bar Examiners,* 353 U.S. 232, 247 [1957] [Frankfurter, J., concurring]).

Respondent recognizes that the power of a state to regulate the practice of law may not be exercised in an arbitrary or discriminatory manner (*Konigsberg* v. *Bd. of Examiners,* 353 U.S. 252, 273 [1957]). Respondent also

recognizes that it may not be exercised in a way which infringes upon constitutional rights (*Bates* v. *St. Bar of Arizona,* 433 U.S. 350, 97 S. Ct. 2691 [1977]; *United Transportation Un.* v. *St. Bar of Michigan,* 401 U.S. 576 [1971]). So long as the state does not exercise its power in such a manner, however, it has autonomous control over the practice of law (*Theard* v. *United States,* 354 U.S. 278, 281 [1957]).

Neither the automatic disbarment statute (Judiciary Law, Section 90, subdivision 4), nor the interpretation thereof by the New York Court of Appeals (*Matter of Chu, infra*), infringes upon any constitutionally protected right. The "right" to practice law may well be an important property or liberty interest within the meaning of the due process clause. It is not a right, however, which has specific constitutional protection. A state may properly adopt a law which adversely affects important property or liberty interests (*San Antonio Ind. School Dist.* v. *Rodriguez,* 411 U.S. 1, 31 [1937]). The Constitution merely requires that the legislation be addressed to a legitimate end and that the means taken are reasonable and appropriate to that end. This Court has defined specific Fourteenth Amendment guidelines as follows:

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland,* 366 U.S. 420, 425-426; (see also: *Rankin* v. *Shankar,* 23 N.Y.2d 111, 119).

The legislature of New York State has determined, in enacting Judiciary Law, Section 88, subdivision 3 (renumbered Judiciary Law, Section 90, subdivision 4 [1945]) that an attorney convicted of a felony crime is conclusively unfit to practice law and is automatically disbarred (*Matter of Keogh,* 25 A.D. 2d 499, 500, mod on other grounds, 17 N.Y.2d 479). The purpose of the statute is clear, namely, to maintain high professional standards for members of the bar and to protect the public. The elimination from the bar of attorneys who have been found guilty of felonious conduct is reasonably related to that goal. As the New York Court of Appeals stated in *Matter of Mitchell,* 40 N.Y.2d 153, quoting Judges Cardozo and Bradley:

> "In our view, this concern for the protection of the public interest far outweighs any interest the convicted attorney has in continuing to earn a livelihood in his chosen profession. Appellant, upon admission to the Bar, became an officer of the court, and, 'like the court itself, an instrument or agency to advance the ends of justice.' (*People ex rel. Karlin* v. *Culkin,* 248 N.Y. 465, 471 [Cardozo, J.].) To permit a convicted felon to continue to appear in our courts and to continue to give advice and counsel would not 'advance the ends of justice', but instead would invite scorn and disrespect for our rule of law. Justice Bradley, writing nearly one hundred years ago, expressed this same fear in language equally applicable to this case and particularly to this attorney: 'Of all classes and professions, the lawyer is most sacredly bound to uphold the laws. He is their sworn servant; and for him, of all men in the

> world, to repudiate and override the laws, to trample them under foot, and to ignore the very bands of society, argues recreancy to his position and office, and sets a pernicious example to the insubordinate and dangerous elements of the body politic. It manifests a want of fidelity to the system of lawful government which he has sworn to uphold and preserve.' (*Matter of Wall*, 107 U.S. 265, 274.)" (*supra* at 156)

Moreover, the constitutionality of Judiciary Law, Section 90, in general and subdivision 4 thereof, in particular has been repeatedly upheld (*Mildner* v. *Gulotta*, 405 F. Supp 182, affd 425 U.S. 901; *Gerzof* v. *Gulotta*, 57 A.D.2d 821, mot for lv to app den, 42 N.Y.2d 960; *Matter of Abrams*, 38 A.D.2d 334; *Matter of Glucksman*, 57 A.D.2d 205; see also: *Matter of Mitchell, supra*).

In *Gerzof*, the Court specifically stated:

> "Moreover, it should be emphasized that the United States Supreme Court has found that section 90 does not violate the Federal Constitution . . ." (*supra* at 822).

To the same effect, the Court in Abrams specifically upheld the constitutionality of the automatic disbarment provision:

> "Although subdivision 4 of section 90 provides for automatic disbarment upon conviction (*Matter of Barash*, 20 N.Y.2d 154 [1967]) respondent's constitutional guarantee of due process is safeguarded by his jury trial and appellate review" (*supra* at 336).

This Court has denied each and every petition for certiorari thus far presented based upon the same claims of

constitutional infirmities, by attorneys who were stricken from the roll of Attorneys pursuant to Judiciary Law, § 90, subdivision 4, based upon their conviction of federal felonies. *Peltz* v. *Joint Bar Association Grievance Committee*, 60 AD 2d 587, mot. lv. to app. den. 43 N.Y. 2d 646, cert. den. May 3, 1978, 436 U.S. 926; *Davis* v. *Joint Bar Association Grievance Committee*, 60 AD 2d 613, mot. lv. to app. den. 44 N.Y. 2d 641, cert. den. October 2, 1978, —— U.S. ——; *Rosenberg* v. *Joint Bar Association Grievance Committee*, 62 AD 2d 1065, mot. lv. to app. den. 44 N.Y. 2d 648, cert. den. October 30, 1978 —— U.S. ——; *Cahn* v. *Joint Bar Association Grievance Committee*, 59 AD 2d 179, mot. lv. to app. den. 44 N.Y. 2d 641, cert. den. January 8, 1979, —— U.S. ——; *Fayer* v. *Joint Bar Association Grievance Committee*, 63 AD 2d 709, mot. lv. to app. den. 45 N.Y. 2d 708, cert. den. January 8, 1979, —— U.S. ——.

CONCLUSION

This appeal should be dismissed.

Dated: Brooklyn, New York
April 13, 1979

Respectfully submitted,

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